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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Justin Robert Escalera,
10 Plaintiff,

No. CV 19-04934-PHX-MTL (JFM)

11 v.

ORDER

12 Corizon Health Incorporated, et al.,
13 Defendants.
14

15 Plaintiff Justin Robert Escalera, who is currently confined in Arizona State Prison
16 Complex-Eyman, brought this civil rights action pursuant to 42 U.S.C. § 1983. (Doc. 1.)
17 Defendant Centurion moves for summary judgment, and Plaintiff opposes.¹ (Docs. 26,
18 82.)² Also pending before the Court is Plaintiff's Motion for injunctive relief in the form
19 of an order directing Centurion to provide him a cleaning device for his BiPap machine
20 and directing Corizon to pay for the cleaning device. (Doc. 70.)

21 **I. Background**

22 In his Complaint, Plaintiff relevantly alleged as follows. In 2015, Plaintiff was
23 evaluated at the Oasis Sleep Study Center (Oasis) and diagnosed with severe sleep apnea
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25
26 ¹ The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952,
27 962 (9th Cir. 1998) (en banc) regarding the requirements of a response. (Doc. 29.)

28 ² Plaintiff cross-moves for summary judgment against Centurion, but that Motion is
not fully briefed. (Doc. 112.)

1 and “placed on a BiPap mask”; it was found that an alternative treatment, a CPap mask
2 would not provide effective treatment. (Doc. 1 at 5, 12.)

3 In August 2018, Plaintiff was taken into the custody of the Arizona Department of
4 Corrections (ADC) and requested a CPap machine after being told by Corizon employees
5 that BiPap masks were unavailable to prisoners. (*Id.* at 5-6; Doc. 2 at 4.) In September
6 2018, the provider that saw Plaintiff in August recommended that Plaintiff be given a BiPap
7 mask for his severe sleep apnea. (Doc. 1 at 6.) At that point, Plaintiff was suffering from
8 severe sleep deprivation, high blood pressure, memory loss, paranoia, suicidal thoughts,
9 hallucinations, depression, and the “daily fear of sudden death thoughts.” (*Id.* at 6-7.)
10 Twice in November, Plaintiff requested the status of the BiPap mask, but did not receive a
11 response until February 2019 when the provider told him that she was issuing a second
12 request to the Corizon Utilization Medical Board for approval of a BiPap mask. (*Id.* at 7-
13 8.) Between February and May 2019, Plaintiff went to medical numerous times due to
14 anxiety attacks he was suffering from lack of sleep. (*Id.* at 8.) After Plaintiff tried to
15 follow-up several times on the status of the BiPap mask, he was told in June 2019 that a
16 third request for a BiPap mask was being submitted to the Corizon Utilization Review
17 Board. (*Id.* at 10.)

18 On June 20, 2019, Plaintiff was issued a CPap mask, but after trying to use it, found
19 that he felt like he was suffocating. (*Id.* at 10-11.) After advising Corizon staff that he had
20 been given the wrong mask, Corizon staff told him he would not be given the BiPap mask
21 due to cost. (*Id.* at 12.) On June 24, 2019, Centurion began providing medical care for the
22 ADC, but Plaintiff complained to the “same medical staff,” who knew of his sleep apnea
23 issues because Centurion employed the same staff as Corizon. (*Id.* at 13.)

24 After Centurion took over, Plaintiff continued to request approval for the BiPap
25 mask, but Centurion’s staff did not file a new request for a BiPap mask and Plaintiff was
26 told to file a grievance even though his condition continued to deteriorate. (*Id.* at 15-16.)
27 In late July, Plaintiff was told to stop coming to medical, that Centurion staff were aware
28 of his issues, and that if he did not stop filing Health Needs Requests, he would receive a

1 disciplinary ticket. (*Id.* at 16-17.) On July 16, 2019, Plaintiff’s request for a BiPap mask
 2 was forwarded to the Centurion Regional Utilization Review Board for approval, and at
 3 the time Plaintiff filed his Complaint in August 2019, he had still not received his BiPap
 4 mask. (*Id.* at 18-20.)

5 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated
 6 Eighth Amendment medical claims against Defendants Corizon and Centurion. (Doc. 8.)
 7 Centurion now moves for summary judgment in its favor. (Doc. 26.)

8 **II. Summary Judgment Standard**

9 A court must grant summary judgment “if the movant shows that there is no genuine
 10 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 11 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The
 12 movant bears the initial responsibility of presenting the basis for its motion and identifying
 13 those portions of the record, together with affidavits, if any, that it believes demonstrate
 14 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

15 If the movant fails to carry its initial burden of production, the nonmovant need not
 16 produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099,
 17 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts
 18 to the nonmovant to demonstrate the existence of a factual dispute and that the fact in
 19 contention is material, i.e., a fact that might affect the outcome of the suit under the
 20 governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable
 21 jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 22 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th
 23 Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its
 24 favor, *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however,
 25 it must “come forward with specific facts showing that there is a genuine issue for trial.”
 26 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal
 27 citation omitted); *see Fed. R. Civ. P. 56(c)(1)*.
 28

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Facts³

Centurion took over the provision of healthcare to ADC prisoners on July 1, 2019. (Doc. 27 ¶ 1; Doc. 83 ¶ 1.) Plaintiff was provided his CPap machine before July 1, 2019 while Corizon was providing healthcare to ADC prisoners. (*Id.* ¶ 2.) On July 11, 2019, Plaintiff submitted a grievance regarding the BiPap machine and on July 16, 2019, the Centurion Facility Health Administrator responded that Corizon approved a CPap machine for Plaintiff and not a BiPap machine, and he had not submitted a new request to see a provider after Centurion took over to discuss his treatment. (*Id.* ¶¶ 3-4.) On August 5, 2019, a provider examined Plaintiff and discussed the matter further with him; she then submitted a request for a BiPap machine to replace the CPap. (*Id.* ¶ 5.) There is no indication in the medical records from that visit or on the request that the request for a BiPap machine was urgent. (*Id.* ¶ 6.)

On October 3, 2019, Plaintiff submitted an informal complaint that he had not yet received the BiPap machine, and a nurse responded that the records showed the provider did re-evaluate and ordered a BiPap, but there was no confirmation it had been received, so she submitted a re-order with specifications. (*Id.* ¶ 8.) There was a change in the processing of orders of those type of machines, which appears to have caused the delay obtaining the BiPap. (*Id.* ¶ 9.) The BiPap machine was given to Plaintiff on December 4, 2019. (*Id.* ¶ 10.) Plaintiff asserts that he was not given a cleaning machine to properly

³ In his Controverting Statement of Facts (Doc. 83), Plaintiff included various additional facts that are unsupported by evidence. Unless otherwise noted, the additional facts Plaintiff asserts do not create a dispute of *material* fact. Because the asserted facts are unsupported by evidence and are not material to deciding the Motion for Summary Judgment, the Court does not recount them here.

1 clean his BiPap mask, which has caused Plaintiff further health issues. (Doc. 83 ¶ 10.) . .

2 **IV. Discussion**

3 Centurion argues that it is entitled to summary judgment because Plaintiff has not
4 shown that the course of treatment provided by Centurion’s employees was medically
5 unacceptable or that the course of treatment was in conscious disregard of Plaintiff’s health.
6 Centurion asserts that after it took over care for ADC prisoners, Plaintiff did not submit a
7 new request to see a provider, but when Plaintiff was seen by a provider on August 5, 2019,
8 the provider submitted a request for the BiPap machine to replace the CPap, but there was
9 no indication that the request was urgent and Plaintiff was provided the BiPap machine in
10 late 2019 after a delay due to changes in the ordering process. Centurion asserts that the
11 delay in giving Plaintiff a BiPap machine after having to reorder the machine due to a
12 change in ordering procedure does not amount to deliberate indifference.

13 Centurion further argues that because Plaintiff has already received the BiPap
14 machine, his request for injunctive relief is moot. Centurion additionally argues that
15 Plaintiff not being provided a cleaning machine is outside the allegations of his Complaint,
16 but even it were relevant, there is no medical evidence supporting Plaintiff’s assertion that
17 he is harmed by not being provided a cleaning device for his BiPap machine. (Doc. 105 at
18 2.)

19 **A. Legal Standard**

20 Under the Eighth Amendment, a prisoner must demonstrate that a defendant acted
21 with “deliberate indifference to serious medical needs.” *Jett v. Penner*, 439 F.3d 1091,
22 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two
23 prongs to the deliberate-indifference analysis: an objective prong and a subjective prong.
24 First, a prisoner must show a “serious medical need.” *Jett*, 439 F.3d at 1096 (citations
25 omitted). A “‘serious’ medical need exists if the failure to treat a prisoner’s condition could
26 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”
27 *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds*
28 *by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal

1 citation omitted). Examples of a serious medical need include “[t]he existence of an injury
2 that a reasonable doctor or patient would find important and worthy of comment or
3 treatment; the presence of a medical condition that significantly affects an individual’s
4 daily activities; or the existence of chronic and substantial pain.” *McGuckin*, 974 F.2d at
5 1059-60.

6 Second, a prisoner must show that the defendant’s response to that need was
7 deliberately indifferent. *Jett*, 439 F.3d at 1096. An official acts with deliberate indifference
8 if he “knows of and disregards an excessive risk to inmate health or safety”; to satisfy the
9 knowledge component, “the official must both be aware of facts from which the inference
10 could be drawn that a substantial risk of serious harm exists, and he must also draw the
11 inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “Prison officials are
12 deliberately indifferent to a prisoner’s serious medical needs when they deny, delay, or
13 intentionally interfere with medical treatment,” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th
14 Cir. 2002) (internal citations and quotation marks omitted), or when they fail to respond to
15 a prisoner’s pain or possible medical need. *Jett*, 439 F.3d at 1096. Deliberate indifference
16 is a higher standard than negligence or lack of ordinary due care for the prisoner’s safety.
17 *Farmer*, 511 U.S. at 835. “Neither negligence nor gross negligence will constitute
18 deliberate indifference.” *Clement v. California Dep’t of Corrs.*, 220 F. Supp. 2d 1098,
19 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir.
20 1980) (mere claims of “indifference,” “negligence,” or “medical malpractice” do not
21 support a claim under § 1983). “A difference of opinion does not amount to deliberate
22 indifference to [a plaintiff’s] serious medical needs.” *Sanchez v. Vild*, 891 F.2d 240, 242
23 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim
24 against prison officials for deliberate indifference. *See Shapley v. Nevada Bd. of State*
25 *Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial.
26 The action must rise to a level of “unnecessary and wanton infliction of pain.” *Estelle*, 429
27 U.S. at 105.
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1 Finally, even if deliberate indifference is shown, to support an Eighth Amendment
2 claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at
3 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing
4 medical treatment does not constitute Eighth Amendment violation unless delay was
5 harmful).

6 To prevail on a claim against Centurion, as a private entity serving a traditional
7 public function, Plaintiff must meet the test articulated in *Monell v. Department of Social*
8 *Services of City of New York*, 436 U.S. 658, 690-94 (1978). *Tsao v. Desert Palace, Inc.*,
9 698 F.3d 1128, 1139 (9th Cir. 2012) (applying *Monell* to private entities acting under color
10 of state law).

11 To make this showing, Plaintiff must demonstrate that (1) he was deprived of a
12 constitutional right; (2) Centurion had a policy or custom; (3) the policy or custom
13 amounted to deliberate indifference to Plaintiff's constitutional right; and (4) the policy or
14 custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino*
15 *Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001). Further, if the
16 policy or custom in question is an unwritten one, the plaintiff must show that it is so
17 "persistent and widespread" that it constitutes a "permanent and well settled" practice.
18 *Monell*, 436 U.S. at 691 (internal quotation and citation omitted). "Liability for improper
19 custom may not be predicated on isolated or sporadic incidents; it must be founded upon
20 practices of sufficient duration, frequency and consistency that the conduct has become a
21 traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.
22 1996).

23 **B. Analysis**

24 Here, there is no evidence that Plaintiff's constitutional right to medical care under
25 the Eighth Amendment was violated as a result of a policy, practice, or custom of
26 Defendant Centurion. Rather, the evidence shows that after Centurion took over the
27 healthcare for the ADC, Plaintiff was provided a BiPap after he made the request from
28 Centurion's medical providers. Although Plaintiff argues that the same providers worked

1 for Centurion and implies that the providers should have known that he wanted to make a
2 new request for a BiPap from Centurion, the Centurion employees' failure to proactively
3 act on Plaintiff's behalf does not demonstrate that they were acting in deliberate disregard
4 to Plaintiff's serious medical needs or that they were acting pursuant to a policy, practice,
5 or custom of Centurion. Rather, the evidence shows that when Plaintiff renewed his
6 request for a BiPap with Centurion, the request was submitted to and later approved by
7 Centurion. Although there was a delay in processing the request for a BiPap machine, this
8 delay shows, at most, negligence, which does not rise to the level of deliberate indifference
9 to serious medical needs and cannot be attributed to a policy, practice, or custom of
10 Centurion.

11 With regard to Plaintiff's new claim that he was not provided a cleaning machine
12 for his BiPap, this claim was not alleged in the Complaint and, as a result, the Court does
13 not have jurisdiction in this action over that claim. Plaintiff's claim regarding the denial
14 of a BiPap cleaning machine is based on entirely different facts than his claim regarding
15 his attempts to obtain a BiPap machine, occurred during a different period of time, and
16 given that the claim was not alleged in the Complaint, the legal theory underlying the claim
17 is not clear to the Court. There are no allegations or evidence in this record that Plaintiff
18 has been denied a cleaning machine based on a policy, practice, or custom of Defendant
19 Centurion.

20 For the foregoing reasons, summary judgment will be granted in favor of Defendant
21 Centurion.

22 **IT IS ORDERED:**

23 (1) The reference to the Magistrate Judge is withdrawn as to Defendant
24 Centurion's Motion for Summary Judgment (Doc. 26), Plaintiff's "Motion for Emergency
25 Preliminary Injunction Against Defendants Corizon Health Incorporated and Defendants
26 Centurion of Arizona, LLC" (Doc. 70), and Plaintiff's Motion for Summary Judgment
27 against Centurion of Arizona, LLC (Doc. 112).
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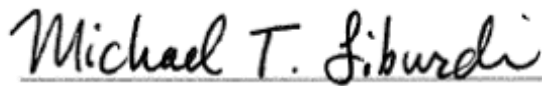
1 (2) Defendant Centurion's Motion for Summary Judgment (Doc. 26) is **granted**.
2 Defendant Centurion is dismissed from this action with prejudice.

3 (3) Plaintiff's "Motion for Emergency Preliminary Injunction Against
4 Defendants Corizon Health Incorporated and Defendants Centurion of Arizona, LLC"
5 (Doc. 70) is **denied** for lack of jurisdiction.

6 (4) Plaintiff's Motion for Summary Judgment against Centurion of Arizona,
7 LLC (Doc. 112) is **denied as moot**.

8 (5) The remaining claim in this action is Plaintiff's Eighth Amendment medical
9 care claim against Defendant Corizon.

10 Dated this 15th day of July, 2020.

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14 Michael T. Liburdi
15 United States District Judge
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